

BEFORE THE
Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of)
)
Advanced Television Systems And Their)
Impact Upon The Existing Television Service)

MM Docket No. 87-268

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To: The Commission

EMERGENCY PETITION FOR RECONSIDERATION

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SUMMARY

Mountain Broadcasting Corporation (“Mountain”), the licensee of WMBC-TV (“WMBC”), Newton, New Jersey, respectfully petitions for reconsideration of two channels allotted to the New York area for implementation of digital television (“DTV”) in the Sixth Report and Order (“Sixth Order”) in this proceeding and of certain policies underlying those allotments. WMBC is an independent, minority-owned station licensed to UHF channel 63 at a northern New Jersey community. It offers significant local news and public affairs, family-oriented, and foreign language and ethnic programming as an alternative to the fare on other stations.

Despite the Commission’s best efforts in an extremely complicated matter, the proposed allotments will cause grave harm to WMBC and its viewers, contrary to the very objectives underlying the DTV proceeding. One such goal is to minimize interference to NTSC stations during the transition to DTV so that the public does not lose the television service it has come to count on. During the transition period, however, the allotment of channel 61 for DTV service by another station will eliminate 19.0 percent of WMBC’s existing service area population, the largest such loss in the New York ADI and one of the largest in the entire country.

Another policy underlying this proceeding is to replicate existing NTSC service areas in making DTV allotments, in order to ensure that broadcasters can continue to reach viewers that they now serve. But Mountain faces an even more significant loss on a permanent basis. WMBC’s DTV service area population on channel 8 during the transition would be 28 percent less than its existing NTSC service area population, a difference of more than two million people. If the current licensees of NTSC stations operating on

channels 7, 8 and 9 in the New York area elect to keep their original allotment for DTV at the end of the transition period, the interference from those stations will continue and the loss of WMBC's service area will be permanent.

The Commission abandoned its initial proposal to equalize service areas among VHF and UHF stations to ameliorate longstanding inequalities, in favor of replicating the existing service area of each station. If this is truly the guiding policy now, then the Commission must not allow any one station to suffer such a debilitating loss of coverage. It surely must not increase existing inequalities between stations.

The loss of coverage that would be imposed on WMBC also contravenes numerous other Congressional and FCC policies. First, by focusing on averages regarding the overall interference experienced by all stations nationally, the Sixth Order ignores the significant loss of service imposed on individual stations such as WMBC. The Commission and courts have long held that loss of broadcast service from a particular station is *prima facie* inconsistent with the public interest. The sheer magnitude of the service loss that would be imposed on WMBC is sufficient in and of itself to mandate reconsideration in this case.

Second, the Commission and Congress have long recognized the intrinsically inferior propagation abilities of UHF stations, and thus taken special measures to foster the viability of that service. The proposed allotments not only perpetuate the inequality of UHF service in the New York ADI, they make that inequality far worse. The four stations that would experience the largest interference in the New York ADI during the transition are all UHF, and WMBC on channel 63 would bear the most significant loss of service of all. UHF

station WMBC also bears the most significant potential loss of service area population in the ADI on a permanent basis.

Third, the threat to WMBC's survival contravenes longstanding policies to encourage the minority ownership of broadcast facilities. Indeed, the Sixth Order specifically recognized that fostering minority ownership is an important consideration in the implementation of DTV. At a time when minority ownership is already falling rapidly, the greatest interference of any New York ADI station should not be imposed on one of the nation's very few minority-owned television stations.

Fourth, the impact of these allotments on WMBC constitutes a significant setback to the establishment of local television service in northern New Jersey. The greatest interference to existing viewers borne by any station in the New York ADI during the transition to DTV is the 19 percent loss imposed on New Jersey's own WMBC. In contrast, all of the stations licensed to New York City will lose on average only two percent of their NTSC population coverage during the transition. WMBC also faces the most serious loss of permanent service area population. Indeed, all of the powerful New York City VHF stations stand to gain audience after transition to DTV.

Finally, the Sixth Order violates the Regulatory Flexibility Act for failure to tailor properly its regulatory requirements to account for their impact on small businesses such as WMBC, while adopting approaches that benefit larger businesses such as the network-owned VHF stations licensed to New York City.

Accordingly, the Commission must make appropriate adjustments in its DTV allotment scheme to ensure that all stations in the New York ADI have the same ability to

replicate their current audience reach, and that no station suffers interference losses disproportionate to any other. In particular, the Commission must reallocate DTV channel 61, in the 60-69 band or elsewhere. Furthermore, consistent with the goal of service area replication, Mountain must be assigned a DTV allotment with which it does not face a devastating loss of service area population on a permanent basis. As described herein, it appears that one such possibility may be channel 34.

The harm caused by the proposed allotments to WMBC and its existing viewers demonstrates that the assumptions underlying the Sixth Order's core spectrum/spectrum recovery approaches are not correct. These approaches clearly do have a substantial and harmful impact on the preeminent goals of minimizing interference and maximizing service area replication. In order to fulfill the DTV policy goals, the Commission must fully utilize channels 60-69, at least in such congested areas as the New York ADI. In addition, the Commission should not protect DTV allotments from interference to the extent that significant losses are imposed on existing NTSC stations. Further, the Commission must afford NTSC stations currently licensed to channels 60-69 with the same opportunity to choose either of their allotments for permanent DTV service at the end of the transition period.

If the Commission does not grant Mountain's Petition, then it must designate a hearing concerning whether the impact of proposed DTV allotments on WMBC would be in the public interest, pursuant to Section 316 of the Communications Act. Mountain has raised substantial and material questions of fact as to whether the Sixth Order's proposals would

disserve numerous public interest policies, including the very principles underlying the DTV proceeding.

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Mountain Broadcasting Corporation ("Mountain"), by its attorneys and pursuant to Section 1.429 of the Commission's Rules, respectfully petitions for reconsideration of two channels allotted to the New York area for implementation of digital television ("DTV") in the Sixth Report and Order ("Sixth Order")¹ in the above-captioned proceeding and of certain policies underlying those allotments. Mountain is the licensee of independent UHF station WMBC-TV ("WMBC"), channel 63, Newton, New Jersey. As shown herein, the proposed allotment of channel 61 to another station for DTV would harm WMBC and its viewers by imposing a huge loss of existing service area population during the transition period. The proposed allotment of channel 8 to WMBC for DTV could further reduce that population on a permanent basis. The devastating impact of these allotments, which

¹FCC 97-115, released April 21, 1997, 62 Fed. Reg. 26684 (May 14, 1997). This petition is timely filed within 30 days after publication of the DTV allotment table in the Federal Register, pursuant to 47 C.F.R. § 1.429(d).

threatens WMBC's very survival, is not only unjust but clearly contrary to the goals of the DTV proceeding and other longstanding FCC and Congressional policies. The Commission must reconsider these allotments.

I. INTRODUCTION.

WMBC is an independent, UHF television station which is licensed to the northern New Jersey community of Newton. The station is owned and controlled by a group of Asian-Americans and the station's principal owners and their family members are actively involved in station management. WMBC offers adults, teenagers and children in the New York ADI local-interest and family-oriented programming that is less violent and more uplifting than what is typically available on other stations. WMBC produces locally and airs a one-half hour prime time newscast every weeknight, as well as a half-hour talk show program focusing on local interests every Saturday night. These are significant undertakings for a new UHF station.

Minority-owned WMBC also provides significant foreign language and ethnic programming for the international population within its viewing area.² In addition to its English-language news and public affairs programming, WMBC produces locally and airs a one-half hour Korean language news program every weeknight, as well as a Korean language talk show focusing on local interests every Saturday night. The station's foreign language

²Each week, the station offers nine hours of Korean language programming, fifteen and a half hours of Japanese language programming, seven hours of Chinese language programming, seventeen hours of Italian language programming, one half hour of Polish language programming, and five hours of Asian Indian programming in Hindi, Gujarati, and English.

service is particularly important since the change in format of another New York ADI station that offered foreign language programming, the former WNYC-TV.

WMBC commenced operations in 1993 after a nearly eight-year comparative proceeding, in which the Commission repeatedly found Mountain to be the superior applicant for the new facility.³ Since that time, the station has achieved a steadily growing audience exposure, both off-air and through cable carriage, although in many cases cable carriage has been obtained only through protracted and costly litigation to enforce the Commission's must-carry rules.⁴

Pursuant to the Sixth Order, WMBC, which is now licensed to channel 63, will be allotted channel 8 for DTV broadcasting. Despite the Commission's best efforts in this complicated undertaking, however, new interference will eliminate 19.0 percent of the station's existing NTSC viewing audience population during the transition to DTV.⁵ This represents a loss of more than 1.5 million people. Mountain's engineering consultant, Robert du Treil, calculates that the primary source of interference to WMBC's existing service area on channel 63 will come from the channel 61 DTV allotment to WNET,

³Bogner-Newton Corp., 2 FCC Rcd 4792 (ALJ 1987); aff'd, 3 FCC Rcd 553 (Rev. Bd. 1988); aff'd and modified, 4 FCC Rcd 2561 (1989); recon. denied, 5 FCC Rcd 2755 (1990); appeal denied, Nos. 89-1271, 90-1270 (D.C. Circuit, Nov. 19, 1990).

⁴See, e.g., Complaint Against Cablevision Systems Corporation, 11 FCC Rcd 2362 (Cable Serv. Bur. 1996); Mountain Broadcasting Corporation, 10 FCC Rcd 7132 (Cable Serv. Bur. 1995). In several instances, WMBC has had to purchase signal reception equipment to be used by local cable operators as part of the process of obtaining carriage.

⁵See Sixth Order, Appendix B, Table 1 at B-30. This is twice the 9.4 percent loss during the transition that would have resulted from the allotment of channel 61 to WMBC, previously proposed in the Sixth Further Notice of Proposed Rule Making ("Sixth NPRM"), 11 FCC Rcd 10968, Appendix B, B-27.

Newark, New Jersey. Although the area of such interference is relatively small, it has tremendous impact on WMBC's continued NTSC operation because WNET's DTV service will presumably be transmitted from the World Trade Center in Manhattan, the location of its existing transmitter. See Exhibit 1 hereto. The interference area calculated by Mr. du Treil includes portions of Bergen, Essex, Hudson, Middlesex, Morris, Passaic, Somerset and Union Counties, New Jersey; portions of Bronx, Kings and Richmond Counties, New York; and most of Manhattan. Id. at Figure 1. Indeed, Mr. du Treil calculates that the population in the WNET channel 61 interference zone is actually more than three million, raising concerns that the FCC procedures significantly underestimate predicted interference. Id. at 2.

Moreover, Mountain ultimately may lose an additional 10 percent of its existing viewing audience on a permanent basis, after the transition to DTV. The Table of Allotments calculates WMBC's existing NTSC service area population at 8.39 million and DTV population during that transition at only 6.01 million, a coverage which is 28 percent less.⁶ This loss is apparently the result of interference from co-channel and first adjacent channel stations. See Exhibit 1.⁷ It appears that WMBC's truncated population coverage with DTV will remain unchanged or even decrease after the transition period. The Sixth

⁶Sixth Order, Appendix B, Table 1 at B-30. Using a different methodology (without inclusion of a UHF "dipole factor"), Mountain's 1994 application for permit to construct its existing facilities calculated Grade B population coverage at 10.9 million. File No. BPCT-940118KF.

⁷Again, Mr. du Treil's calculations indicate that this loss will actually be even greater. Exhibit 1 at 4.

Order allows broadcasters to switch their DTV service to their existing NTSC channels at the end of the transition period, provided that existing channel is within the core spectrum.⁸ Thus, of the stations impacting WMBC's DTV allotment, WWOR-TV may keep NTSC channel 9 rather than DTV channel 38, WABC-TV may keep channel 7 rather than 45, WTNH-TV may keep channel 8 rather than 10, and WGAL may keep channel 8 rather than 58. In each case, a lower channel assignment would appear to be preferable.⁹ Thus, each of these stations would continue to create interference to WMBC's operations on channel 8, particularly co-channel station WTNH(TV), which is licensed to New Haven, CT. See Exhibit 1 at 4.

Mountain understands that any DTV allotment plan may "unavoidably result in some degree of interference,"¹⁰ at least during the transition period. But allotment decisions which have such a grossly disproportionate impact on one station, including the likelihood of a permanent loss of service, are not only inequitable but contrary to the very policies underlying the transition to DTV. Moreover, given the special status of WMBC as a minority-owned, independent, UHF station licensed to northern New Jersey, an FCC action that so drastically curtails its service and threatens its very existence contravenes numerous other Congressional and FCC policies.

⁸Sixth Order at ¶ 84.

⁹In contrast, WICZ-TV, Binghamton, New York, is likely to select channel 8 rather than its existing allotment, channel 40.

¹⁰Sixth Order at ¶ 85.

II. THE LOSS OF SERVICE TO BE IMPOSED ON WMBC AND ITS VIEWERS IS CONTRARY TO THE POLICIES GOVERNING IMPLEMENTATION OF DTV.

A. Minimization Of Interference To NTSC Service During The Transition.

The proposed allotment to WMBC cannot be reconciled with the very objectives underlying the DTV proceeding. The Commission initially proposed to give a relative preference to establishing DTV operations over protecting NTSC operations in the allotment process. On reconsideration, it abandoned that approach because “NTSC operations will continue to be important for some time.”¹¹ According to the Sixth Order, its Table of Allotments thus attempted to minimize interference to all stations.¹² “It is important to protect the existing NTSC service in designing the DTV Table so that the public does not lose television service during the transition.”¹³

The proposed New York area allotments do not minimize interference to WMBC or protect its viewers from loss of the service they have become accustomed to during the transition to DTV. Approximately one of every five people now living in the station’s service area would no longer be able to receive an acceptable signal from WMBC. Mountain doubts that many stations could accept such a loss in viewership over the next decade, let alone a new, independent UHF station.¹⁴ But this off-air loss is only part of the total

¹¹Sixth NPRM at ¶ 39.

¹²Sixth Order at ¶ 87.

¹³Id.

¹⁴While the Sixth Order contemplates the completion of the DTV transition by 2006, there is obviously no certainty that this will be the case. Moreover, Congress is reportedly
(continued...)

burden that the Sixth Order would impose on WMBC. The proposed allotments will undoubtedly cause the station to lose much of the cable carriage it fought so hard to obtain, by reducing signal quality at cable system head ends. The interference will thus likely have an even more far-reaching affect.¹⁵

B. Replication Of Existing Service Areas.

The Commission initially proposed a DTV allotment approach that would maximize the service areas of all DTV stations.¹⁶ “This approach would tend to equalize the coverage areas of all stations within a market and reduce the current disparities among stations.”¹⁷ In the Sixth NPRM, however, the Commission determined that an alternative approach of replicating existing service areas would offer important benefits not only to stations but also

¹⁴(...continued)

considering a bill that will allow broadcasters to delay return of analog spectrum in markets where five percent or more of households continue to rely upon over-the-air analog TV signals. “Digital TV Conversion is Focus of Budget Markup,” Communications Daily, June 6, 1997 at 2. In any event, a period of even nine years is clearly a long, long time to accept such extensive loss of listenership.

¹⁵Mountain participated in the Broadcasters’ Caucus’ efforts to develop a fair and workable DTV allotment proposal. However, it vehemently opposed the Caucus’ subsequent allotment plan, which contemplated a 27.9 percent loss in viewing audience to WMBC during the implementation of DTV. Mountain’s Comments in this proceeding advocated an absolute floor on the maximum allowable percentage of audience loss or interference to any particular station, to ensure that no individual station would bear a loss of viewers so severe. See Mountain’s November 22, 1996 Comments and January 24, 1997 Reply Comments in this proceeding. The Commission did not address Mountain’s proposals in its Sixth Order, however.

¹⁶Second Further Notice of Proposed Rule Making, 7 FCC Rcd 5376 (1992) at ¶ 15.

¹⁷Sixth NPRM at ¶ 14.

to their viewers, and revised its assignment methodology accordingly.¹⁸ The Sixth Order, in adopting the latest Table of DTV Allotments, reaffirmed the Commission's commitment to NTSC service area replication and, towards that end, established a minimum power level:

We believe that providing DTV allotments that replicate the service areas of existing stations offers important benefits for both viewers and broadcasters. This approach will ensure that broadcasters have the ability to reach the audiences that they now serve and that viewers have access to the stations that they can now receive over-the-air.

* * *

In considering the DTV power issue, we believe that it is important to adopt an approach that provides for a high degree of service replication by all stations, while at the same time ensuring that all stations are able to provide DTV service competitively within their respective markets.¹⁹

Contrary to this governing principle, the proposed allotment of channel 8 to WMBC for DTV clearly does not ensure the station a high degree of service area replication. Rather, WMBC is faced with a huge loss of service area population on a permanent basis, with permanent harm to its ability to maintain cable carriage. Nor would the proposed allotments ensure that WMBC could provide DTV service "competitively" in the New York ADI. Rather, the allotment threatens the station's very survival.

The Commission's allotment methodology apparently overvalued the fact that WMBC's geographic DTV service area during the transition (11,904 km²) is greater than its existing geographic NTSC service area (10,979 km²). Mr. du Treil believes that the

¹⁸Id. at ¶¶ 13, 43.

¹⁹Sixth Order at ¶¶ 29-30 (emphasis added).

geographical service area predicted for DTV increases in the more rugged and remote areas with low population density, such as the Kittatinny Mountain Range. See Exhibit 1 at 3. An increase in geographic coverage resulting in a two million person loss in service area population is certainly no gain for a television station or for its existing viewers.

The Commission abandoned its initial proposal to equalize service areas among VHF and UHF stations to ameliorate longstanding inequalities, in favor of replicating the existing service area of each station. If this is truly the guiding policy now, then the Commission must not allow any one station and its viewers to suffer such a debilitating loss of coverage. It surely must not increase inequalities between stations. Indeed, an allotment so detrimental that it threatens WMBC's very existence cannot be said even to "accommodate" WMBC's transition to DTV, another goal underlying the DTV proceeding.

III. THE HARM TO WMBC IS CONTRARY TO LONGSTANDING CONGRESSIONAL AND FCC POLICIES.

A. The Policy Against Loss Of Existing Service From Individual Stations.

By focusing on averages regarding the overall interference experienced by all stations nationally, the Sixth Order ignores the significant loss of service imposed on individual stations such as WMBC. Even if 99 percent of NTSC viewers in the entire United States would be "unaffected" by the implementation of DTV, as the Sixth Order asserts, that would be of no consolation to the one in five viewers in WMBC's service area that will lose the station's service during the transition to DTV or the even greater number that might lose service forever.

The Commission and courts have long held that loss of broadcast service by an individual station is “*prima facie* inconsistent with the public interest.”²⁰ Indeed, “[t]hat such a curtailment of service is not in the public interest is axiomatic.”²¹ Accordingly, loss of service to the public is a primary factor in a long line of FCC decisions on waiver requests for proposed station modifications.²² The sheer magnitude of the service loss that would be imposed on WMBC, both during the transition and possibly on a permanent basis, is sufficient in and of itself to mandate reconsideration of the relevant New York area allotments. WMBC would face the greatest loss of population in the New York ADI, both during the transition and on a permanent basis.²³

B. The Policy Of Protecting And Encouraging UHF Television Stations.

The loss of service imposed on WMBC is especially harmful to a struggling new UHF station. The Commission and Congress have long recognized the intrinsically inferior propagation abilities of UHF stations, and thus taken special measures to foster the viability of that service. In 1962, Congress passed the All-Channel Television Receiver Act requiring

²⁰New Jersey Public Broadcasting Authority, 74 FCC 2d 602 (1979) at ¶ 7, citing Hall v. FCC, 237 F.2d 567 (D.C. Cir. 1956). See also United Television, Inc., 48 FCC 2d 265 (1974).

²¹Hall v. FCC, 237 F.2d at 572 (remand of modification permit grant that would result in elimination and downgrading of service in certain areas).

²²See, e.g., New Jersey Public Broadcasting Authority, *supra* (denying Brunswick, New Jersey educational station’s application to relocate transmitter to short-spaced site, where “[c]onsiderable areas” in New Jersey within its contours would have predicted signal strength “degraded or eliminated”). See also West Michigan Telecasters, Inc., 26 FCC 2d 668 (1970), *aff’d*, West Michigan Telecasters v. FCC, 460 F.2d 883 (1972).

²³See Exhibits 2-A and 2-B hereto.

that all television sets be equipped to receive UHF channels.²⁴ The Commission subsequently mandated that all sets have comparable ease of tuning for channels on either band and that all receivers supplied with a VHF antenna have a UHF antenna as well.²⁵ For purposes of the national television ownership limit, UHF stations continue to be attributed with only 50 percent of their theoretical reach within an ADI.²⁶ In addition, Congress' reimposition of cable must carry requirements in 1992 was based upon the need to preserve service from local stations, particularly weaker stations such as independent UHF broadcasters.²⁷

The four stations that would experience the largest interference in the New York ADI during the transition to DTV are all UHF, and WMBC on channel 63 would bear the most significant loss of service of all. In contrast, the largest interference imposed on any VHF station's population in the ADI during the transition is only 5.1 percent, a little more than one-quarter the interference imposed on WMBC. See Exhibit 2-A hereto. UHF station WMBC also bears the most significant potential loss of service on a permanent basis. WMBC is the only station in the New York ADI with a transitional DTV service area population that will be more than a million less than its existing NTSC population. Indeed,

²⁴Pub. L. No. 87-529, 76 Stat. 150 (1962).

²⁵Improvements to UHF Television Reception, Notice of Inquiry, 70 FCC 2d 1720 (1978) at ¶¶ 12, 13.

²⁶47 C.F.R. § 73.3555(e)(2)(i). See Amendment of § 73.3555 of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations, 100 FCC 2d 74, 57 RR 2d 966 (1985).

²⁷See, e.g., S. Rep. No. 92, 102d Cong., 1st Sess. 45 (1991). See also Turner Broadcasting v. FCC, No. 95-992, 1997 U.S. LEXIS 2078 at *40-41, *44-45.

it will be more than two million less.²⁸ In contrast, all of the VHF stations in the New York ADI except one receive a transitional DTV coverage area with a population greater than their existing NTSC coverage (four of these VHF stations by more than a million people).²⁹ See Exhibit 2-B.

The proposed allotment to WMBC not only perpetuates the inequality of UHF service in the New York ADI, it makes that inequality far worse, both during the transition to DTV and most likely on a permanent basis. It is one thing for the Commission to decide as a matter of policy not to equalize UHF and VHF service, but quite another to make the coverage of UHF stations worse while improving that of VHF stations in the same ADI.

C. The Policy Of Encouraging Minority Ownership.

The threat to WMBC's survival from its service area losses also contravenes policies to encourage the minority ownership of broadcast facilities. For the past twenty years, the Commission has adopted various measures in order to remedy the dearth of minority ownership in broadcasting.³⁰ Indeed, in an ongoing proceeding begun in 1995, the Commission is seeking "to explore ways to provide minorities and women with greater

²⁸This coverage differential is twelve times greater than the next largest such DTV/NTSC population differential for a New York ADI station. See Exhibit 2-B.

²⁹WNET's initial DTV allotment would cover a population 67,000 smaller than its current NTSC population. However, its DTV allotment is outside the core spectrum and thus would ultimately be reassigned. See Exhibit 2-B.

³⁰See Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 FCC 2d 979, 42 RR 2d 1689 (1978); Amendment of § 73.3555 of the Commission's Rules, 100 FCC 2d at ¶ 45; 47 C.F.R. § 76.503.

opportunities to enter the mass media industry”³¹ Its purpose in doing so is “to further the core Commission goal of maximizing the diversity of points of view available to the public over the mass media, and to provide incentives for increased economic opportunity.”³² The Commission noted that while past policies had facilitated minority ownership, the overall representation of minorities in station owners remained “far below” their presence in the national population.³³

Indeed, the New York Times recently reported that “[t]he sparse ranks of minority radio and television station owners are growing thinner”³⁴ Minorities own only 37 television stations in the United States, a mere 3 percent of the 1,221 total.³⁵

The Sixth Order specifically recognized that fostering minority ownership is an important consideration in the implementation of DTV. The Commission decided to allow new entrants and non-eligible broadcasters to apply for new DTV allotments, and permit non-eligible broadcasters to convert to DTV within the core spectrum, in order to “further our diversity goals”:

³¹See Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities, Notice of Proposed Rule Making, 10 FCC Rcd 2788 (1995) at ¶ 1.

³²Id.

³³Id. at ¶ 5.

³⁴See Andrea Adelson, “Minority Voice Fading For Broadcast Owners,” N.Y. Times, May 19, 1997 at D9. See also Paul Farhi, “Jackson Asks FCC to Stop Sale of DC Radio Stations,” Washington Post, May 16, 1997 at G1. Moreover, the paucity of minority ownership is particularly acute with regard to television. In its 1995 NPRM, the Commission observed that minority broadcasters are more likely to own radio than more expensive full power television stations. 10 FCC Rcd 2788 at ¶ 37.

³⁵“Minority Voice Fading For Broadcast Owners,” *supra*.

We concur with the commenting parties that it is important to continue to foster our longstanding broadcast policy goals of diversity and encouraging new entry, particularly by minorities and women. We also believe that fostering these goals is consistent with our spectrum management responsibilities to ensure that the DTV spectrum is used efficiently.³⁶

The flawed allotments in the New York ADI now threaten the very survival of one of the few minority-owned television stations. At a time when minority ownership is already falling rapidly, the most significant service losses in the ADI should not be imposed on a minority-owned station. Nor should minority viewers in WMBC's existing service area be deprived of its unique foreign language and ethnic programming. The New York ADI is home to significant populations from other cultures speaking other languages.

D. The Policy Of Promoting Locally-Oriented Television In New Jersey.

The proposed allotment also causes local television service in New Jersey to suffer, while largely preserving the service of stations licensed to New York City. New Jersey has had a long history of inadequate local television service because of the relatively few stations allotted to its communities, requiring FCC and Congressional action to address the problem. In 1976, the Commission reported that "New Jersey's 7.4 million people receive less than the daily, detailed local television news and public affairs coverage enjoyed by viewers in other parts of the country."³⁷ It concluded that "New Jersey's television needs and its overall circumstance constitute a special case warranting unique and responsive action by the

³⁶Sixth Order at ¶ 95 (emphasis added).

³⁷Petition for Inquiry into the Need for Adequate Television Service for the State of New Jersey, First Report and Order and Notice of Proposed Rule Making, 58 FCC 2d 790, 36 RR 2d 1105 (1976) at ¶ 15.

Commission.”³⁸ In the Tax Equity and Fiscal Responsibility Act of 1982³⁹ Congress adopted a provision, sponsored by a New Jersey Senator, that encouraged WOR-TV (now WWOR-TV) to relocate to a northern New Jersey community in order to avoid the loss of its license at an ongoing hearing.⁴⁰

WMBC provides significant coverage of New Jersey news and events in its public affairs programming, including unique interviews with prominent local officials and community leaders, with the goal of providing information to help individuals and improve the quality of life in its service area. Station reporters are based in Palisades Park and Lake Hopatcong, New Jersey, among other locations. Recent station news interviews have included the Democratic nominee for Governor of New Jersey, and another interview has been scheduled for the Governor.⁴¹

The impact of the DTV allotments on WMBC constitutes a significant setback to the establishment of local television service in northern New Jersey. The greatest interference to

³⁸Id. The Commission thus required New York City television stations to demonstrate at renewal their commitment to providing service in New Jersey. Petition For Inquiry Into The Need For Adequate Television Service For The State Of New Jersey, Second Report and Order, 59 FCC 2d 1386 (1976). It also adopted waivers to its cable television rules at that time to allow any New Jersey system to carry the signal of any New Jersey television station as well as New Jersey-oriented programming from New York City stations. Office of Cable Television, State of New Jersey, Memorandum Opinion and Order, 68 FCC 2d 1431 at ¶ 41 (1978).

³⁹Pub. L. No. 97-248, 96 Stat. 324 (1982).

⁴⁰In re RKO General, 1 FCC Rcd 1081, 61 RR 2d 1069, 1073 (1987).

⁴¹Of course, WMBC also extensively covers news and events throughout its existing service area, and airs considerable programming targeted to ethnic and other viewers in and around New York City. Its viewers in New York should not be deprived of the station's unique program service any more than viewers in New Jersey.

existing viewers borne by any station in the New York ADI during the transition to DTV is the 19 percent loss imposed on New Jersey's own WMBC. In contrast, all of the stations licensed to New York City will lose on average only two percent of their NTSC population coverage during the transition. See Exhibit 2-A hereto.⁴² New Jersey's WMBC is also forced to bear the greatest difference between existing NTSC and transitional DTV service area populations in the ADI -- a loss of more than two million people! In contrast, six of the seven stations licensed to New York City will gain service area population in transitional DTV coverage as compared to NTSC coverage, three of them by more than a million. See Exhibit 2-B.

E. The Policy Of Minimizing Regulatory Burdens On A Small Business.

The Regulatory Flexibility Act ("RFA") was enacted in 1980 to address concerns that small businesses bore a disproportionate share of the burdens of federal regulations.⁴³ The purpose of the RFA is that "agencies shall endeavor . . . to fit regulatory . . . requirements to the scale of the businesses . . . subject to regulation."⁴⁴ The RFA, as amended, requires agencies engaged in rulemakings to prepare an Initial and a Final Regulatory Flexibility Analysis.⁴⁵ The Final Analysis must include a description of the steps the agency has taken to "minimize the significant economic impact on small entities" consistent with applicable

⁴²The affiliates of CBS, NBC and ABC licensed to New York City will lose less than one-half of one percent of their existing population coverage during this time. Id.

⁴³Pub. L. No. 96-354, 94 Stat. 1165.

⁴⁴Id. at § 2(b).

⁴⁵5 U.S.C. §§ 603 & 604.

statutes, including a statement of reasons for selecting the alternative adopted in the final rule and why other significant alternatives which affect the impact on small entities were rejected.⁴⁶

The RFA defines the term “small business” to have the same meaning as the term “small business concern” under the Small Business Act,⁴⁷ i.e., one which is independently owned and operated, not dominant in its field of operation, and satisfies any additional Small Business Administration (“SBA”) criteria. Under SBA regulations, television broadcasting stations must have no more than a maximum of \$10.5 million in annual receipts in order to qualify.⁴⁸ WMBC thus qualifies as a small business for purposes of the RFA.

Appendix D of the Sixth Order is the Commission’s Final Regulatory Flexibility Analysis with regard to the DTV allotments. The summary of steps taken to minimize burdens on small entities simply reiterates the Order’s conclusions that the service replication approach was adopted to ensure broadcasters can reach their present viewers and that the core spectrum and spectrum recovery approaches (discussed below) have an “insubstantial” impact on interference and service replication.⁴⁹ As demonstrated herein, those generalized assertions are certainly not correct in the case of WMBC. Significantly, Appendix D fails to

⁴⁶5 U.S.C. § 604(a)(5).

⁴⁷15 U.S.C. § 632.

⁴⁸Sixth Order, Appendix D, at D-3. In pending proceedings (GN Docket 96-113; MM Docket 96-16), the Commission has sought comment on the definition of “small business” for its purposes. The Commission has correctly recognized that, because it did not propose an alternative definition in its Initial Regulatory Flexibility Analysis in this proceeding, the SBA’s definition must apply. Id. at D-4.

⁴⁹Id. at D-11-12.